RECORD
AND
BRIEFS

No. 15-1485

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATE OF UTAH AND TWENTY-FIVE OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
**Counsel of Record*
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

Counsel for Amicus Curiae State of Utah

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Police officers found late-night partiers inside a vacant home belonging to someone else. After giving conflicting stories for their presence, some partiers claimed they had been invited by a different person who was not there. The lawful owner told the officers, however, that he had not authorized entry by anyone. The officers arrested the partiers for trespassing. The questions presented are:

1. Whether the officers had probable cause to arrest under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state.

2. Whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

TABLE OF CONTENTS

	Page
STATEMENT OF *AMICI CURIAE* INTEREST ...	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. Petitioners Had Probable Cause To Arrest Respondents For Trespassing In The Vacant House	5
A. The Totality Of The Circumstances – Including Petitioners' Inferences From Available Facts – Established Probable Cause For Respondents' Arrests	5
B. In Assessing Probable Cause, Officers Can Rely On Reasonable Inferences That Contradict A Suspect's Claims Of An Innocent Mental State	10
II. Qualified Immunity Shields Petitioners From Liability For Arresting Respondents In The Vacant House	15
A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken	16
B. The Cases That Squarely Govern Petitioners' Conduct Did Not Put Them On Notice That Respondents' Arrests In The Vacant House Violated Clearly Established Law	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972) 7, 9

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*

Artisst v. United States, 554 A.2d 327 (D.C. 1989) ... 2, 24

Ashcroft v. al-Kidd, 563 U.S. 731 (2011) 1, 22, 23

Baker v. McCollan, 443 U.S. 137 (1979). 7

Beck v. Ohio, 379 U.S. 89 (1964) 6

Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011) 19, 20, 21

Brigham City v. Stuart, 547 U.S. 398 (2006) 7

City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765 (2015) 23

Commonwealth v. Brown, No. 1394-15-2, 2016 WL 308584 (Va. Ct. App. Jan. 26, 2016) 14

Culp v. United States, 486 A.2d 1174 (D.C. 1985) 3

Finigan v. Marshall, 574 F.3d 57 (2d Cir. 2009) 19

Florida v. Harris, 133 S. Ct. 1050 (2013) 1, 6, 7, 9, 10

Garcia v. Jane & John Does 1-40, 779 F.3d 84 (2d Cir. 2015) 16, 18

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7, 17

Hunter v. Bryant, 502 U.S. 224 (1991) 6, 8, 16, 17

Illinois v. Wardlow, 528 U.S. 119 (2000) 9

Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) 10

TABLE OF AUTHORITIES – Continued

Page

Luzzi v. Hirsch, No. 3:10CV481, 2011 WL 6780968 (D. Conn. Oct. 20, 2011) 21

McGloin v. United States, 232 A.2d 90 (D.C. 1967) 2, 24

Newsome v. Whitaker, No. Civ.A.03-3182, 2005 WL 525398 (E.D. Pa. Mar. 4, 2005).....21

Ornelas v. United States, 517 U.S. 690 (1996) 6, 11, 12

Painter v. City of Albuquerque, 383 F. App'x 795 (10th Cir. 2010).....19, 21

Pearson v. Callahan, 555 U.S. 223 (2009) 15, 22

Pennsylvania v. Dunlap, 129 S. Ct. 448 (2008).....9

Pierson v. Ray, 386 U.S. 547 (1967).....16

Ramirez v. City of Buena Park, 560 F.3d 1012 (9th Cir. 2009).....24

Reichle v. Howards, 132 S. Ct. 2088 (2012).....23

Sennett v. United States, 667 F.3d 531 (4th Cir. 2012) 23

Stanton v. Sims, 134 S. Ct. 3 (2013).....24

United States v. Cortez, 449 U.S. 411 (1981)....6, 11, 12

Wesby v. Dist. of Columbia, 816 F.3d 96 (D.C. Cir. 2016) .....*passim*

Wesby v. Dist. of Columbia, 765 F.3d 13 (D.C. Cir. 2014) 5, 10, 11, 12, 17

White v. Pauly, 137 S. Ct. 548 (2017).....22

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 3, 7, 22

STATUTES

Ala. Code § 13A-7-2(a) 13

Ariz. Rev. Stat. Ann. § 13-1504(A)(1) 13

Ark. Code Ann. § 5-39-203(a)(2) 14

Colo. Rev. Stat. § 18-4-502 13

Conn. Gen. Stat. § 53a-108(a) 13

D.C. Code § 22-3302 ..... 2, 8

Del. Code Ann. tit. 11, § 822 13

Fla. Stat. Ann. § 810.08(1) 13

Ga. Code Ann. § 16-7-21(b)(1) 13

Haw. Rev. Stat. § 708-813(1)(a) 13

Ind. Code § 35-43-2-2(b)(5)(B) 13

720 Ill. Comp. Stat. 5/21-3(a)(1) 13

Kan. Stat. Ann. § 21-5808(a)(1) 13

Ky. Rev. Stat. Ann. § 511.060(1) 13

Me. Rev. Stat. tit. 17-A, § 402 13

Miss. Code Ann. § 97-17-93(1) 13

Mo. Rev. Stat. § 569.140(1) 13

Mont. Code Ann. § 45-6-203(1) 13

N.D. Cent. Code § 12.1-22-03(1) 13

TABLE OF AUTHORITIES – Continued

Page

N.H. Rev. Stat. Ann. § 635:2(I) 13

N.J. Stat. Ann. § 2C:18-3(a) 13

N.M. Stat. Ann. § 30-14-1(A) 13

N.Y. Penal Laws § 140.15(1) 13

Neb. Rev. Stat. § 28-520(1)(a) 13

Ohio Rev. Code Ann. § 2911.21(A)(1) 13

18 Pa. Cons. Stat. § 3503(a)(1)(i) 13

S.D. Codified Laws § 22-35-5 13

W. Va. Code § 61-3B-2 13

Wash. Rev. Code § 9A.52.070(1) 13

Wis. Stat. § 943.14 14

Wyo. Stat. Ann. § 6-3-303(a) 13

RULES

Fed. R. Civ. P. 56 18

OTHER AUTHORITIES

Model Penal Code § 221.2 13

STATEMENT OF *AMICI CURIAE* INTEREST

The Court of Appeals' decision contradicts this Court's settled precedent on probable cause and on qualified immunity. The *amici* States have a pronounced interest in securing a decision from this Court that corrects those errors because accurate precedent on both doctrines is indispensable to the States' efforts to effectively enforce their laws.

Decisions that incorrectly apply the doctrine of probable cause hinder law enforcement officers' ability to stop crime and protect the public. *See Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). And decisions that improperly narrow the qualified immunity defense shrink the "breathing room" this Court has given State officials to govern and act when only opaque law guides their conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Police officers in particular – who often must make difficult decisions in stressful, dangerous circumstances – "should no more be held personally liable in damages than should" other State officials when those officers' judgments "are objectively legally reasonable." *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

Unfortunately the Court of Appeals' decision does just that. Its judgment should be reversed.

SUMMARY OF ARGUMENT

In 1901, Clark Gable and Walt Disney were born. The Ottoman dynasty still had more than 20 years left in its reign. And the District of Columbia passed a criminal trespass statute making it a misdemeanor for "[a]ny person . . . without lawful authority" to "enter, or attempt to enter, any . . . private dwelling . . . against the will of the lawful occupant" – a prohibition that remained unchanged for more than 100 years, *see* D.C. Code § 22-3302 (2008).

Since then, Washington D.C. courts have interpreted the criminal trespass statute to "clearly *permit[ ]* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Wesby v. Dist. of Columbia*, 816 F.3d 96, 111 (D.C. Cir. 2016) (*Wesby II*) (Kavanaugh, J., dissenting from den. of reh'g en banc); *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)).

In other words, when the events giving rise to this case occurred, the black-letter law in the District of Columbia for more than 100 years had been that where "an officer observes a person inside a vacant building, the officer has reason to believe that person does not belong there, and the property itself reveals indications of a continued claim of possession by the owner

or manager, there is probable cause to arrest for unlawful entry." *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985).

In accordance with that more than century's worth of precedent, Petitioners[1] arrested Respondents for trespassing in a vacant home well past midnight one Sunday morning after confirming with the home's owner that Respondents had no right to be there. The District of Columbia eventually decided not to press charges. Respondents then sued Petitioners under 42 U.S.C. § 1983. They contended, as relevant, that Petitioners violated their Fourth Amendment rights by arresting them. The federal district court rejected Petitioners' contention that probable cause supported the arrests and denied their requests for qualified immunity. It granted summary judgment to Respondents instead, and after a trial, awarded damages jointly against the District and the officers personally in an amount that now exceeds $1 million (including fees). The D.C. Circuit affirmed that judgment in a 2-1 decision and denied Petitioners' request for rehearing en banc over the dissent of four judges.

The Court of Appeals' judgment must be reversed. Its first error is its holding that Respondents' arrests were not supported by probable cause. It justified that holding only by improperly excluding Petitioners'

---

[1] Unless otherwise stated, *amici* use the term "Petitioners" in this brief to refer to Officers Parker and Campanale, exclusive of the District of Columbia itself.

inferences of Respondents' guilt – based on their experience and training – from the totality of the circumstances Petitioners could have considered. Excising Petitioners' inferences was necessary, it concluded, because Respondents had offered excuses for their presence in the vacant home that contradicted them. The resulting rule: When a suspect offers an innocent explanation for his conduct, an officer's contradictory inferences of a suspect's guilt *cannot by themselves* support probable cause to arrest. That rule cannot be reconciled with this Court's probable-cause precedent.

The Court of Appeals also misapplied this Court's qualified immunity cases. It held that Petitioners lacked even *arguable* probable cause – a holding driven by the court's erroneous view that an officer must *subjectively disbelieve* a suspect's proffered excuse before considering that excuse as part of the totality of the circumstances. This reasoning contradicts the well-established rule that review of an arguable probable cause conclusion in a qualified immunity case is *objective*, not *subjective*; the officers' subjective beliefs about the suspect's intent are irrelevant. And even if that view of the law about arguable probable cause were correct, it had never before been applied in any American court, so it was not clearly established when Petitioners arrested Respondents. But the Court of Appeals likewise rejected Petitioners' request for qualified immunity on that basis – continuing the regrettable trend among the courts of appeals of applying a newly created rule retroactively to strip State officials of qualified immunity.

Each of those errors justifies – indeed, requires – reversing the Court of Appeals' judgment.

ARGUMENT

I. Petitioners Had Probable Cause To Arrest Respondents For Trespassing In The Vacant House.

The Court of Appeals held that "no reasonable officer could have concluded that there was probable cause to arrest" Respondents for trespassing in the vacant house. *Wesby v. Dist. of Columbia*, 765 F.3d 13, 19 (D.C. Cir. 2014) ("*Wesby I*"). That erroneous holding creates a dangerous rule inconsistent with this Court's precedent: It precludes officers from relying on objectively reasonable inferences to support probable cause for an arrest if a suspect asserts an innocent mental state.

A. The Totality Of The Circumstances – Including Petitioners' Inferences From Available Facts – Established Probable Cause For Respondents' Arrests.

1. This Court need not break new ground to resolve this case; its existing precedent on probable cause makes plain the panel's error.

Probable cause for an arrest exists "if 'at the moment the arrest was made . . . the facts and circumstances within [the officers'] knowledge and of which

they had reasonably trustworthy information were sufficient to warrant a prudent man in believing'" that the suspect had committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Those facts and circumstances include not just perceivable events and data but also "inferences" that "a police officer may draw . . . based on his own experience in deciding whether probable cause exists," *Ornelas v. United States*, 517 U.S. 690, 700 (1996) – even "inferences and deductions that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981).

To ensure officers have appropriate case-specific flexibility to draw those inferences, probable cause eschews "rigid rules, bright-line tests, and mechanistic inquiries." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). Probable cause "turn[s] on the assessment of probabilities in particular factual contexts," and the probability of crime is as variable as criminal ingenuity. *Id.* at 1056. Officers thus take an "all-things-considered approach" that "consistently look[s] to the totality of the circumstances." *Id.* at 1055. In each case they assess probable cause guided by "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Id.* (internal quotation marks and brackets omitted). The evidence supporting their assessments – whether perceived or inferred – "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418.

And when assessing probable cause, "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place." *Harris*, 133 S. Ct. at 1055 (brackets omitted). So probable cause for an arrest can exist even if the officer has not yet gathered the quantum of evidence on an element of the crime that "would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). Indeed, the "Constitution does not guarantee that only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

Whether the totality of the circumstances gives an officer probable cause to arrest "generally turns on the 'objective legal reasonableness'" of the arrest. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). After all, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

2. This case could have been easily resolved by applying those straightforward precedents.

Petitioners arrested Respondents for trespassing in a vacant house well past midnight on a Sunday morning. Before they arrested Respondents, Petitioners had talked to the vacant house's owner by phone; the owner told them that *no one* had his permission to be there. Petitioners also called Peaches, whom Respondents claimed had invited them into the vacant house (and had since left). At first Peaches equivocated but eventually she admitted that she lacked authority

to invite Respondents into the house – and then she refused to return there because she did not want to be arrested. Both of those phone calls happened after (1) Petitioners saw Respondents and their co-partiers – some of whom wore garter belts stuffed with money – run for cover when the officers entered the vacant house, which smelled of marijuana smoke; and (2) Respondents told Petitioners conflicting stories about why they were there. Only *after* learning all those facts did Petitioners arrest Respondents for trespassing in violation of D.C. Code § 22-3302.

Under any fair reading of this Court's precedent, those facts created probable cause for Respondents' arrests. No one disputes that Respondents had committed the *actus reus* of trespassing – "that the partiers were on private property without permission from an owner or renter, and without other lawful authority." *Wesby II*, 816 F.3d at 98 (Pillard, J., concurring in den. of reh'g en banc). So the only disputed question is Respondents' mental state – whether there was evidence that Respondents "entered a place they *knew or should have known* was off limits." *Id.*

This Court's cases permit but one answer to that question: The "facts and circumstances" at the time of arrest "were sufficient to warrant a prudent [officer] in believing" that Respondents knew (or should have known) they had no right to be in the vacant house. *Hunter*, 502 U.S. at 228 (internal quotation marks omitted). The homeowner and Peaches had both confirmed to Petitioners that Respondents were unlawfully present; Respondents told inconsistent stories to

explain why they were there; and Respondents ran and hid in closets when Petitioners appeared. Those facts – and Petitioners' inferences from them – established a "probabilit[y] in" this "particular factual context[]" that Respondents knew (or should have known) they lacked permission to be in the vacant house. *Harris*, 133 S. Ct. at 1056.

To be sure, that is not the *only* conclusion that Petitioners could have drawn; Respondents might have been as innocent as they claimed to be. And Petitioners might have determined that Respondents' explanations were reasonable and might have chosen not to arrest them. But that does not mean that Petitioners' decision to arrest was unreasonable. Indeed, "persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). And "an officer is not required to eliminate all innocent explanations for a suspicious set of facts to have probable cause to make an arrest." *Pennsylvania v. Dunlap*, 129 S. Ct. 448, 448-49 (2008) (Roberts, C.J., dissenting from den. of cert.).

That Respondents ultimately were not convicted also does not undermine the conclusion that Petitioners had probable cause to arrest them. The quantum of evidence needed to support a finding of probable cause differs from the quantum of evidence "needed to support a conviction." *Adams*, 407 U.S. at 149. And for more than 200 years the law has been that the former is lower than the latter – "the term 'probable cause' . . .

means less than evidence which would justify condemnation." *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). So whether Respondents were convicted has no bearing on whether their arrests were lawful.

Because probable cause can exist without officers' ruling out all innocent explanations, "reasonable and prudent people" readily could have found a "fair probability" that Respondents knew or should have known they lacked permission to be in the vacant house. *Harris*, 133 S. Ct. at 1055. That conclusion is entirely reasonable given all the facts and reasonable inferences here. *See Anderson*, 483 U.S. at 639.

B. In Assessing Probable Cause, Officers Can Rely On Reasonable Inferences That Contradict A Suspect's Claims Of An Innocent Mental State.

The Court of Appeals purported to agree with and to apply the legal framework discussed above, yet it reached the opposite conclusion. It held that "*no reasonable officer* could have concluded that there was probable cause to arrest" Respondents for trespassing in the vacant house. *Wesby I*, 765 F.3d at 19 (emphasis added). The court concluded that Petitioners lacked probable cause as a matter of law because the record lacked evidence of Respondents' mental state: *Nothing* suggested that Respondents knew or should have known they lacked permission to be in the vacant house.

The keystone of the Court of Appeals' holding was Peaches' invitation to Respondents. *See id.* at 21. For absent "any conflicting information," the court reasoned, "Peaches' invitation" to Respondents "vitiates the necessary element of" Respondents' "intent to enter against the will of the lawful owner." *Id.* "A reasonably prudent officer aware that" Respondents "gathered pursuant to an invitation from someone with apparent (if illusory) authority *could not conclude* that they had entered unlawfully." *Id.* (emphasis added).

Whatever that rule's logic generally, the Court of Appeals made a crucial legal error in applying it here. It failed to recognize that Petitioners *actually had* "conflicting information" about Respondents' mental state at the time of arrest. That conflicting information was Petitioners' inferences (drawn in light of the facts available to them and their specialized experience and training) about whether Respondents were lying. This Court's probable-cause precedent entitled Petitioners to draw those inferences, based on their specialized training and expertise, and to weigh them with other available facts in determining whether they had probable cause to arrest Respondents. *Ornelas*, 517 U.S. at 700; *Cortez*, 449 U.S. at 418.

But when Petitioners argued that those inferences supported their finding of probable cause, the Court of Appeals dismissed their arguments in a footnote as "beside the point." *Wesby I*, 765 F.3d at 21 n.4. Far from it; those inferences *are* the point. The Court of Appeals' conclusion that the facts here *compelled* Petitioners

to reject their inference that Respondents were lying effectively establishes a new legal rule: A suspect's professed innocent mental state always trumps a trained officer's inferences suggestive of guilt (absent *direct affirmative evidence* contradicting the suspect's statement). In other words, by making officers' reasonable inferences of guilt categorically "beside the point," the Court of Appeals excised an entire class of critical evidence from probable cause's totality-of-the-circumstances calculus. Under the Court of Appeals' new some-of-the-circumstances test, a trained officer's inferences and deductions must yield to a suspect's contrary self-serving assertions, *Ornelas* and *Cortez* notwithstanding.

Judge Brown foresaw how the panel's opinion would change the probable cause assessment. She warned that "officers are simply not required to credit the exonerating statements of suspected wrongdoers where the totality of the circumstances suggests such claims should be treated with skepticism." *Wesby I*, 765 F.3d at 35 (Brown, J. dissenting). "Such a conclusion is not compelled by either our case law or common sense." *Id.*

If this Court nevertheless approves the panel opinion's departure from existing probable cause precedent, it would have vast consequences for the States' law enforcement efforts. This departure from precedent is thus of serious concern to *amici*. To take just one example, criminal trespass statutes in at least twenty-eight states and the Model Penal Code require

proof that a defendant "knowingly" or "willfully" entered into a structure or dwelling without permission.[2]

---

[2] *See* Ala. Code § 13A-7-2(a) (2017) (criminal trespass occurs when a person "knowingly" enters or remains unlawfully in a residential dwelling); Ariz. Rev. Stat. Ann. § 13-1504(A)(1) (2017) (same); Colo. Rev. Stat. § 18-4-502 (2017) (same); Conn. Gen. Stat. § 53a-108(a) (2017) (same); Del. Code Ann. tit. 11, § 822 (2017) (same); Fla. Stat. Ann. § 810.08(1) (2017) (criminal trespass occurs if a person "willfully [enters] or [remains]" in a structure without "being authorized, licensed, or invited"); Ga. Code Ann. § 16-7-21(b)(1) (2017) (prohibiting entry into a premises "knowingly and without authority"); Haw. Rev. Stat. § 708-813(1)(a) (2017) (criminal trespass occurs when a person "knowingly enters or remains unlawfully in a dwelling"); 720 Ill. Comp. Stat. 5/21-3(a)(1) (2017) (same); Ind. Code § 35-43-2-2(b)(5)(B) (2017) (same); Kan. Stat. Ann. § 21-5808(a)(1) (2017) (prohibiting entry into a structure by persons who know they are "not authorized or privileged" to do so); Ky. Rev. Stat. Ann. § 511.060(1) (2017) (prohibiting "knowingly" entering or remaining unlawfully in a dwelling); Me. Rev. Stat. tit. 17-A, § 402 (2017) (same); Miss. Code Ann. § 97-17-93(1) (2017) (trespassing occurs when a person "knowingly enter[s] the lands of another without . . . permission"); Mo. Rev. Stat. § 569.140(1) (2017) ("knowingly" entering or remaining unlawfully in a structure or residence); Mont. Code Ann. § 45-6-203(1) (2017) (same); Neb. Rev. Stat. § 28-520(1)(a) (2017) (same); N.H. Rev. Stat. Ann. § 635:2(I) (2017); N.J. Stat. Ann. § 2C:18-3(a) (2017) (same); N.M. Stat. Ann. § 30-14-1(A) (2017) ("[c]riminal trespass consists of knowingly entering or remaining upon posted private property" without permission); N.Y. Penal Laws § 140.15(1) (Consol. 2017) ("knowingly enter[ing] or remain[ing] unlawfully in a dwelling"); N.D. Cent. Code § 12.1-22-03(1) (2017) (same); Ohio Rev. Code Ann. § 2911.21(A)(1) (2017) (same); 18 Pa. Cons. Stat. § 3503(a)(1)(i) (2017) (same); S.D. Codified Laws § 22-35-5 (2017) ("[a]ny person who, knowing that he or she is not privileged to do so, enters or remains in any building . . . surreptitiously" commits criminal trespass); Wash. Rev. Code § 9A.52.070(1) (2017) (same); W. Va. Code § 61-3B-2 (2017) (same); Wyo. Stat. Ann. § 6-3-303(a) (2017) (same); *accord* Model Penal Code § 221.2 (1981) ("A person commits an offense if, knowing that he is not

An additional two states require proof that a defendant entered "intentionally" or "purposefully."[3] Until now, state courts have not required officers enforcing those statutes to disregard their inferences of wrongdoing when a suspect professes an innocent mental state. *See, e.g.*, *Commonwealth v. Brown*, No. 1394-15-2, 2016 WL 308584, at *1 (Va. Ct. App. Jan. 26, 2016) (mem. op.) (holding that an officer had probable cause to arrest a suspect for trespassing in an apartment complex that had ongoing "problems with trespassing" – even after the suspect told officers that he was visiting "either . . . his sister or his girl" – based on inferences the officer drew because the suspect did not have an exact address for the apartment building he wished to visit, avoided making eye contact, "was 'very nervous'" while talking to the officers, and would not provide the name of the person he was visiting). But such decisions will become rare if this Court agrees with the Court of Appeals that a suspect's self-serving profession of innocence trumps a trained, experienced officer's reasonable inferences.

* * *

---

licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure . . . .").

[3] *See* Ark. Code Ann. § 5-39-203(a)(2) (2017) ("[a] person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon the premises owned or leased by another person."); Wis. Stat. § 943.14 (2017) (a person commits criminal trespass if he or she "intentionally enters or remains in the dwelling of another" without consent).

The Court of Appeals' decision requires officers assessing probable cause to arrest to defer to suspects' statements about their innocent mental state, thereby eliminating from the totality of the circumstances an officer's conflicting inferences. Nothing in the United States Reports supports that approach. This Court should reverse the Court of Appeals' judgment and hold – based on *all* the facts and circumstances, *including* Petitioners' inferences – that Petitioners had probable cause to arrest Respondents for trespassing in the vacant house.

II. Qualified Immunity Shields Petitioners From Liability For Arresting Respondents In The Vacant House.

Even if this Court concludes that Petitioners lacked probable cause to arrest Respondents, it still should reverse the judgment below because Petitioners are entitled to qualified immunity for two reasons. First, the Court of Appeals misapplied this Court's cases extending qualified immunity to officers who reasonably but mistakenly conclude that probable cause supports an arrest. Second, the Court of Appeals erroneously concluded that Petitioners had violated clearly established law. *See Pearson v. Callahan*, 555 U.S. 223, 243 (2009). Neither holding withstands scrutiny.

A. Petitioners' Conclusion That Probable Cause Supported Respondents' Arrests Was Objectively Reasonable, Even If Mistaken.

Law enforcement officers "who 'reasonably but mistakenly conclude that probable cause is present' " and justifies an arrest are entitled to qualified immunity. *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967). Put differently, this Court's "cases establish that qualified immunity shields" officers "from suit for damages if 'a reasonable officer could have believed' " the arrest " 'to be lawful, in light of clearly established law and the information the arresting officers possessed.' "[4] *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641) (brackets omitted). Because arguable probable cause is an objective inquiry, it "will often require examination of the information possessed by the" arresting officers. *Anderson*, 483 U.S. at 641. But it "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent." *Id.* The officers' "subjective beliefs about the" arrest "are irrelevant." *Id.*

The Court of Appeals misapplied that precedent. It held that qualified immunity did not protect

---

[4] Ten courts of appeals now refer to the *Hunter* rule by the shorthand "arguable probable cause." *See Wesby II*, 816 F.3d at 105-06 (Kavanaugh, J., dissenting from den. of reh'g en banc). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Garcia v. Jane & John Does 1-40*, 779 F.3d 84, 92 (2d Cir. 2015) (citations omitted).

Petitioners because their conclusion that they had probable cause to arrest Respondents in the vacant home was *unreasonable* as a matter of law. *See Wesby I*, 765 F.3d at 26-27. In doing so, the court paid lip service to *Hunter*'s objective-reasonableness rule, but it effectively rewrote *Hunter* to create a subjective-reasonableness test when criminal suspects give officers excuses tending to negate a culpable mental state. *See Wesby II*, 816 F.3d at 101 (Pillard, J., concurring in den. of reh'g en banc).

In particular, when concurring in the denial of Petitioners' en banc petition, the panel opinion's author explained that under her opinion, whether an objectively reasonable officer could have doubted the truthfulness of the suspects' excuses is irrelevant to determining probable cause to arrest; what really matters is whether the "officers *actually doubt* a suspect's credibility." *Id.* at 100 (Pillard, J., concurring in den. of reh'g en banc) (emphasis added). So only an officer's subjective "actual[] doubt[s]" arising from potentially bogus excuses can constitute "conflicting information" about a suspect's *mens rea* worthy of an officer's taking "into account when assessing whether the totality of the circumstances support probable cause." *Id.*

That reasoning turns on its head the bedrock rule that qualified immunity "turns on the 'objective legal reasonableness' of the" arrest. *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Objective tests ask what "a reasonable officer *could have believed*," *id.* at 641; what these *specific* officers "actually" believed, *Wesby II*, 816 F.3d at 100 (Pillard, J., concurring in

den. of reh'g en banc), matters not at all. Any fair application of arguable probable cause thus must include the judgments and conclusions an objectively reasonable officer *could have drawn* from a suspect's excuses – based on his training and experience – within the totality of the circumstances, *regardless* of whether the specific officers *actually* reached those conclusions. Yet the Court of Appeals walled off those considerations from arguable probable cause's totality-of-the-circumstances calculus here because, in its view, Petitioners did not personally reach them.[5]

That never has been the law. Quite the contrary: All eleven courts of appeals that have addressed the issue (including a prior D.C. Circuit opinion) have held that judgments a reasonable officer *could have reached* about the suspect's truthfulness necessarily form part of the totality of the circumstances when assessing arguable probable cause to arrest for a mens rea crime. Or, in other words, that both a suspect's excuses *and* (even contradictory) inferences a reasonable officer could have drawn from them are relevant to assessing arguable probable cause. *See Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting from den. of reh'g en banc) (citing cases); *see also Garcia v. Jane & John*

---

[5] The Court of Appeals' conclusions about Petitioners' subjective beliefs are flawed in their own right. They are based on a contested reading of D.C. law and on inferences from the evidence drawn against Petitioners, contrary to Rule 56's command that inferences are to be drawn in the non-moving party's favor. Petitioners did not need to introduce evidence of their subjective beliefs in any event; such evidence is irrelevant under this Court's qualified-immunity precedent.

Does 1-40, 779 F.3d 84, 93 (2d Cir. 2015) ("It is well established that a police officer aware of facts creating probable cause to suspect a prima facie violation of a criminal statute is 'not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.'"); *Finigan v. Marshall*, 574 F.3d 57, 63 (2d Cir. 2009) (holding that officers need not sit as prosecutor, judge, or jury because "[t]heir function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of evidence") (citation omitted).

Two cases from other circuits show how the Court of Appeals should have resolved this case. First, in *Painter v. City of Albuquerque*, 383 F. App'x 795 (10th Cir. 2010), the court affirmed a judgment granting qualified immunity to officers who arrested a suspect on suspicion of cashing a fraudulent check despite the suspect's claim that "the officers lacked probable cause . . . because they had no reason to believe he possessed the requisite mental state, or mens rea." *Id.* at 799 (Gorsuch, J.). Writing for the panel, then-Judge Gorsuch reasoned that "the facts known to the officers here, while not pointing uniformly in the same direction or metaphysically dispositive of [the suspect's] intent, were sufficient for an objectively reasonable officer to think that [the suspect] *probably* harbored the intent to cash a check he knew not to be valid." *Id.* at 800.

Second, in *Borgman v. Kedley*, 646 F.3d 518 (8th Cir. 2011), an officer was called to the Wild Rose Casino by casino staff and asked to arrest the plaintiff for

trespassing. The plaintiff, a problem gambler, had previously signed a voluntary exclusion order at the Mississippi Belle – a different casino that the Wild Rose had purchased – warning her that she would be trespassing if she entered the Mississippi Belle "and all of its . . . assigns" at any future point. *Id.* at 520-21. The Wild Rose was an "assign" of the Mississippi Belle. *Id.* at 521.

When the officer arrived, security staff told him that the plaintiff had stated she was not aware that the Wild Rose was an "assign" of the Mississippi Belle and thus that she lacked the *mens rea* for trespassing. *Id.* at 521. The officer knew of no evidence controverting the plaintiff's statement about her mental state, but he still arrested her for criminal trespass. *Id.* at 522. The criminal case was dismissed and the plaintiff filed a claim under 42 U.S.C. § 1983 for false arrest.

The Eighth Circuit held that the officer was entitled to qualified immunity because probable cause supported the arrest for trespassing. It stated that "[a]n officer can rely on 'the implications of the information known to him' when assessing whether a suspect possessed the state of mind required for the crime." *Id.* at 524. The court further held that "[i]t is usually not possible for an officer to be certain about a suspect's state of mind at the time for a criminal act, but *he need not rely on an explanation given by the suspect.*" *Id.* (citation omitted; emphasis added). "Viewing the facts in the light most favorable to" the suspect (as the party not seeking summary judgment) "means only that the

court must accept that she emphatically denied knowing that she was trespassing, *but does not mean that a reasonable officer would have believed her.*"[6] *Id.* (emphasis added).

Had the Court of Appeals followed the reasoning in *Painter* and in *Borgman*, it would have held that Petitioners "are entitled to qualified immunity because they at least *reasonably could have believed* that they had probable cause" to arrest Respondents. *Wesby II*, 816 F.3d at 105 (Kavanaugh, J., dissenting from den. of reh'g en banc) (emphasis in original). Respondents' conflicting excuses could have given an objectively reasonable officer ample reason to question Respondents' *mens rea* – especially when viewed in the context of the full panoply of facts Petitioners already knew when they arrested them. So under a straightforward application of this Court's precedent, Petitioners are entitled to qualified immunity: They *at least* had arguable probable cause to arrest Respondents.

---

[6] *See also, e.g., Luzzi v. Hirsch*, No. 3:10CV481, 2011 WL 6780968, at *5 (D. Conn. Oct. 20, 2011) (granting summary judgment to officers who arrested hunter for trespass and holding that although *mens rea* was an element of the crime, "[i]t is irrelevant here"); *Newsome v. Whitaker*, No. Civ.A.03-3182, 2005 WL 525398 (E.D. Pa. Mar. 4, 2005) (granting summary judgment to officers where plaintiff claimed he was entitled to be on premises where he was arrested for criminal trespass).

B. The Cases That Squarely Govern Petitioners' Conduct Did Not Put Them On Notice That Respondents' Arrests In The Vacant House Violated Clearly Established Law.

Petitioners are also entitled to qualified immunity for the separate reason that the law upon which the panel majority relied to strip them of qualified immunity – its novel, erroneous view of probable cause – was not clearly established. "An officer conducting [an arrest] is entitled to qualified immunity where clearly established law does not show [the arrest] violated the Fourth Amendment." *Pearson*, 555 U.S. at 243-44.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson*, 483 U.S. at 635). The official action's unlawfulness "must be apparent . . . in the light of preexisting law." *Anderson*, 483 U.S. at 640 (citations omitted). The right cannot be defined "'at a high level of generality'" but "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *al-Kidd*, 563 U.S. at 742; *Anderson*, 483 U.S. at 640).

To be sure, the panel opinion's author disputed the dissenting judges' conclusion that the opinion applies a new rule, downplaying its disagreement about the outcome here as "entirely fact-bound." *Wesby II*, 816

F.3d at 101 (Pillard, J., concurring in den. of reh'g en banc) (internal quotation marks omitted). But this *post-hoc* justification actually proves otherwise.

The Court of Appeals cited no case with the "particularized" holding that inferences or conclusions an objectively reasonable officer *could have drawn* from the totality of circumstances to support probable cause must be *excluded* from that calculus when (1) a suspect's *mens rea* is an element of the crime, (2) the suspect offers an innocent explanation for his conduct, and (3) the officer subjectively did not doubt those explanations. There is no Supreme Court case so holding. And *amici* have not found a controlling D.C. Circuit case, or a "'robust consensus of cases of persuasive authority'" standing for such a proposition (to the extent that such cases constitute "clearly established" law). *City & Cnty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (quoting *al-Kidd*, 563 U.S. at 742); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (assuming "arguendo" that a Court of Appeals' controlling authority could be "a dispositive course of clearly established law").

The absence of such authority is not surprising: The panel majority's view contradicts the apparently otherwise uniform view of the courts of appeals. *See Sheehan*, 135 S. Ct. at 1778 (noting that the "opposite" of a "consensus of cases of persuasive authority" cannot clearly establish law). A suspect's "'innocent explanations for his odd behavior cannot eliminate the suspicious facts from the probable cause calculus.'" *Sennett*

v. United States, 667 F.3d 531, 536 (4th Cir. 2012) (quoting *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009)). That's because "[t]he test [for probable cause] is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior." *Id.* (quoting *Ramirez*, 560 F.3d at 1024); *see also Wesby II*, 816 F.3d at 107-08 (Kavanaugh, J., dissenting from den. of reh'g en banc) (citing cases).

As a result, whatever else might be said about the panel majority's view, "one thing is crystal clear: No decision prior to the panel opinion here had prohibited arrest under D.C. law in these circumstances." *Id.* at 111 (Kavanaugh, J., dissenting from den. of reh'g en banc). On the contrary – applicable D.C. Court of Appeals case law "clearly *permits* police officers to arrest a person for trespassing even when that person claims to have the right to be on the property, if a reasonable officer could disbelieve the suspected trespasser." *Id.*; *see also id.* at 109 (citing *Artisst v. United States*, 554 A.2d 327 (D.C. 1989); *McGloin v. United States*, 232 A.2d 90 (D.C. 1967)). "It is especially troubling that the [D.C.] Circuit would conclude that [Petitioners were] plainly incompetent – and subject to personal liability for damages – based on actions that were lawful according to courts in the jurisdiction where [they] acted." *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013).

So "[t]his should have been a fairly easy case for qualified immunity." *Wesby II*, 816 F.3d at 111 (Kavanaugh, J., dissenting from den. of reh'g en banc). Regrettably, the panel majority did what this Court "has

repeatedly told [it] not to do" – "create[] a new rule and then appl[y] that new rule retroactively against the police officers." *Id.* at 111 (Kavanaugh, J., dissenting).

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
**Counsel of Record*
KYLE J. KAISER
MEB W. ANDERSON
Assistant Attorneys General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

Counsel for Amicus Curiae
State of Utah

ADDITIONAL COUNSEL

STEVEN T. MARSHALL
Attorney General
STATE OF ALABAMA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

DOUGLAS S. CHIN
Attorney General
STATE OF HAWAII

LISA MADIGAN
Attorney General
STATE OF ILLINOIS

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

ANDY BESHEAR
Attorney General
COMMONWEALTH OF KENTUCKY

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

BRIAN E. FROSH
Attorney General
STATE OF MARYLAND

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN

JIM HOOD
Attorney General
STATE OF MISSISSIPPI

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA

GORDON J. MACDONALD
Attorney General
STATE OF NEW HAMPSHIRE

CHRISTOPHER S. PORRINO
Attorney General
STATE OF NEW JERSEY

MICHAEL DEWINE
Attorney General
STATE OF OHIO

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON

JOSH SHAPIRO
Attorney General
COMMONWEALTH OF
PENNSYLVANIA

PETER F. KILMARTIN
Attorney General
STATE OF RHODE ISLAND

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

HERBERT H. SLATERY III
Attorney General
STATE OF TENNESSEE

KEN PAXTON
Attorney General
STATE OF TEXAS

PATRICK MORRISEY
Attorney General
STATE OF WEST VIRGINIA

BRAD D. SCHIMEL
Attorney General
STATE OF WISCONSIN